

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
SST FOUNDATION,	:	
	:	No. 07 Civ. (SCR)
Plaintiff,	:	
	:	
-against-	:	
	:	
NEW YORK STATE DEPARTMENT OF TAXATION,	:	
	:	
Defendant.	:	
-----X		

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE’S
MOTION TO DISMISS**

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PRELIMINARY STATEMENT

Defendant, the State of New York (the “State”), respectfully submits this memorandum of law in support of its motion, pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the amended complaint (the “Amended Complaint”) in this action for lack of subject matter jurisdiction. As shown below, plaintiff’s claims against The New York State Department of Taxation and Finance are barred by the Eleventh Amendment..

THE COMPLAINT

Plaintiffs SST Foundation , seeks to bring a variety of tort claims against three entities: Credit Suisse (“CS”), Credit Suisse American Securities, Inc (“CSAS”), and the State of New York Department of Taxation and Finance (“DTF”), mistakenly sued here as the “New York State Department of Taxation.” It is plaintiff’s contention that CS mistakenly transferred securities belonging to plaintiff, a Lichtenstein foundation, Complaint ¶ 1, to CSAS, where they were placed into an account labeled and identified by the name and the Social Security Number of one individual beneficiary of the trust, Donald Kalfin,. Id. ¶¶ 8, 12-13. Thereafter, on February 6, 2007, DTF purportedly issued and served a levy on SAS for \$511,889.81 owed by the owners of the trust.. Id. ¶ 14. Those monies were paid to DTF. Id. ¶ 17.

The basis of jurisdiction alleged here is diversity of citizenship pursuant to 28 U.S.C. § 1332. Id. ¶ 5. Plaintiff brings only a single, state-law, tort claim against DTF, a claim of unjust enrichment. Id. at ¶¶ 42-46.

ARGUMENT

THE ELEVENTH AMENDMENT BARS
PLAINTIFF'S CLAIMS AGAINST THE STATE

The Eleventh Amendment bars suits in federal court against a state or its agencies, absent either: (i) the state's unambiguous consent to such a suit; or (ii) a valid and unambiguous abrogation of sovereign immunity by Congress. See, e.g., Board of Trustees v. Garrett, 531 U.S. 356, 363 (2001).¹ The Eleventh Amendment precludes claims against the State for monetary relief, as well as claims for declaratory and injunctive relief. See Pennhurst Interstate Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984); Cory v. White, 457 U.S. 85, 91 (1982); Alabama v. Pugh, 438 U.S. 781, 781-82 (1978); Missouri v. Fiske, 290 U.S. 18, 27 (1933).

The State of New York has not consented to be sued in federal court on ordinary tort claims, such as plaintiff's claim of "unjust enrichment" against DTF. . See Trotman v. Palisades Interstate Park Comm'n, 557 F.2d 35, 40 (2d Cir. 1977); Bowles v. New York, 37 F. Supp. 2d 608, 610 (S.D.N.Y. 1999).

Because plaintiff has sued DTF in federal court, where there is no jurisdiction over his claim, the claim against DTF is barred by the Eleventh Amendment, and this Court lacks subject matter jurisdiction to adjudicate the cause of action. The complaint must therefore be dismissed as against DTF.

¹ Accord Seminole Tribe v. Florida, 517 U.S. 44, 56, 66 (1996); Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144-45 (1993); Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-101 (1984); Alabama v. Pugh, 438 U.S. 781, 781-82 (1978); Garcia v. State Univ. of N.Y. Health Sciences Ctr. of Brooklyn, 280 F.3d 98, 114 (2d Cir. 2001); Burnette v. Carothers, 192 F.3d 52, 59 (2d Cir. 1999).

CONCLUSION

For all of the foregoing reasons, defendant new York State Department of Taxation and Finance respectfully request that the Court dismiss the Complaint as against it, and grant such other and further relief as it deems just and proper.

Dated: New York, New York
July 2, 2007

Respectfully submitted,

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